No. 93-580

In The

Supreme Court of the United States

October Term, 1993

GARY D. LEWIS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

Petition For A Writ Of Certiorari To The Ohio Court Of Appeals For Allen County, Third Appellate District

PETITIONER'S REPLY BRIEF

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I. ARGUMENT

Obviously, the State of Ohio correctly states the law that "[t]he words of the statute can be used [in an indictment] if 'the words themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' " Brief in Opposition, p. 7 (citing *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) and *Evans v. United States*, 153 U.S. 584, 14 S.Ct. 934, 38 L.Ed. 830 (1894).) However, it is exactly Mr. Lewis' position that the term "deception" fails to "fully, directly, and expressly, without any uncertainty

or ambiguity" apprise him of the element of the offense of which he was charged.

This is most notably demonstrated by the State of Ohio's *new* claim that the deception for which Mr. Lewis was convicted included "[his use of] his position as a police officer to create fear." Brief in Opposition, p. 8. Such a form of deception was never advanced prior to trial, during trial, or on appeal. Paraphrasing *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962):

> [Mr. Lewis] was put to trial and convicted upon an indictment which did not even purport to inform him in any way of the identity of the [deception alleged by the State]. At every stage of the ensuing criminal proceeding [Mr. Lewis] was met with a different theory, or by no theory at all, as to what the [deception] had been. Far from informing [Mr. Lewis] of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large – to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal.

Russell at 768, 82 S.Ct. at 1049.

As such, Mr. Lewis is not "angling towards an argument such as found in *Schad v. Arizona* [___ U.S. ___, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991)]." Brief in Opposition, p. 9. As noted by the four dissenting justices in *Schad*:

> The issue is not whether the statute here is so vague that an individual cannot reasonably know what conduct is criminalized. Indeed, the statute's specificity renders our vagueness cases inapplicable.

Id., 111 S.Ct. at 2509 (White, J. dissenting). Unlike Mr. Lewis, the defendant in *Schad* knew exactly what conduct was alleged to constitute the offense: the killing of Lorimer Grove. While the defendant in *Schad* faced two well-defined theories of culpability, Mr. Lewis faced a never-defined theory, that changed throughout the trial and appeal. Rather than abandon the alternative theories, as suggested in Brief in Opposition, p. 9, the State of Ohio has continuously advanced many ever-changing theories, as is evidenced by the advancement of four different theories on the preceding page of the State's Brief. Brief in Opposition, p. 8.

Nor is the State of Ohio's argument supported by the citation to *Schad* for the proposition that

> where a State's particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate.

Brief in Opposition, pp. 9-10 (quoting *Schad*, 111 S.Ct. at 2501, 115 L.Ed.2d at 570-571). Rather, as demonstrated in the Petition for Writ of Certiorari, pp. 19-20, Ohio's theft statute defines as a single crime a "plethora" of former crimes under the "broad concept" of "deception." As such, there is no "long history" to serve as notice to Mr. Lewis as to what specific conduct the indictment charged. "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in

the same generic terms as in the definition; but it must state the species, – it must descend to particulars." *Russell* at 765, 82 S.Ct. at 1047.

The "liberal discovery" and "list of witnesses" provided by the State of Ohio, Brief in Opposition, p. 10, did not inform Mr. Lewis of the nature and cause of the accusation. Rather, it merely informed Mr. Lewis of whom the State of Ohio intended to call to prove the undefined accusation. The fact that Mr. Lewis "presented a vigorous defense," and "called ten witnesses on his behalf," *id.*, likewise does not demonstrate that Mr. Lewis was informed of the nature and cause of the accusation. In fact, Mr. Lewis' vigorous defense in demonstrating that he had provided services for Ms. Shepherd and that she wanted him to have the money he received – a defense to the State of Ohio's theory of guilt prior to trial – was advanced by the State of Ohio as evidence of deception after trial. As the offense was charged in such vague and generic terms, the State of Ohio was permitted to change the accusation so as to use Mr. Lewis' defense as evidence of guilt.

The State of Ohio points to theft statutes in Florida[1] and New York, alleging that the Ohio statute "is more specific than similar statutes in in [sic] other states. Brief in Opposition, p. 10. However, Florida Rules of Criminal Procedure, Rule 3.140(d)(1) provides in part:

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[1] Respondent cites to Florida Statutes Annotated § 812.021. Brief in Opposition, p. 12. That statute was repealed effective October 1, 1977. Florida's current theft statute and corresponding definitions, Florida Statutes Annotated §§ 812.012 and 812.014, are provided in the appendix.

> (1) *Allegation of Facts; Citation of Law Violated.* Each count of an indictment or information on which the defendant is to be tried shall allege the essential facts constituting the offense charged. . . .

Florida Rules of Criminal Procedure, Rule 3.140(n) provides:

> **(n) Statement of Particulars.** The court, on motion, shall order the prosecuting attorney to furnish a statement of particulars when the indictment or information on which the defendant is to be tried fails to inform the defendant of the particulars of the offense sufficiently to enable the defendant to prepare a defense. The statement of particulars shall specify as definitely as possible the place, date, and all other material facts of the crime charged that are specifically requested and are known to the prosecuting attorney, including the names of persons intended to be defrauded. *Reasonable doubts concerning the construction of this rule shall be resolved in favor of the defendant.*

(emphasis supplied). The Committee Notes to subparagraph (n) recognize that the new rule narrows the scope of judicial discretion in granting the statement of particulars.

In reproducing New York Penal Law § 155.05, Brief in Opposition, App. 1, the State of Ohio omitted a paragraph under larceny by false promise describing the heightened evidentiary requirements of proving larceny by false promise.[2] As in Florida, New York Criminal

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[2] The complete text of New York Penal Law § 155.05 is provided in the appendix.

Procedure Law § 200.50 provides that an indictment must contain:

> 7. A plain and concise factual statement in each count which, without allegations of an evidentiary nature,
>
> (a) asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation. . . .

The Practice Commentary to § 200.50 notes that:

> The specifics of the indictment as supplemented by the bill of particulars assume a critical role at trial. Here the indictment serves as a guideline to prevent the case from being prosecuted and submitted to the petit jury for ultimate determination on a theory other than the one charged by the grand jury. Where that occurs, the error is known as "variance" and should timely objection be overruled, it requires reversal of the conviction. See *e.g.*, *People v. Grega*, 1988, 72 N.Y.2d 489, 534 N.Y.S.2d 674, 531 N.E.2d 279, on remand 146 A.D.2d 871, 536 N.Y.S.2d 581.

Thus it appears that both Florida and New York provide safeguards not present in Ohio.

Even if the State of Ohio is correct that the Ohio practice is no worse than the practices of Florida and New York, such a fact would provide an additional incentive for this Court to grant certiorari in this cause. Obviously, where the words of statute, due to their generic nature, fail to apprise an accused of the nature of the

offense for which he is charged, it is no answer to point to other statutes suffering from the same defect. By condemning the Ohio practice of charging offenses in generic terms and failing to inform the accused of the nature and cause of the accusation, as mandated by the Sixth Amendment to the United States Constitution, this Court will provide guidance to other states whose statutes define crimes in similar generic terms. This Court should grant Mr. Lewis' writ on his behalf and on the behalf of others similarly situated, and declare the current Ohio practice unconstitutional.

II. CONCLUSION

WHEREFORE; petitioner Gary D. Lewis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Ohio Court of Appeals for Allen County, Third Appellate District, entered in the above-entitled proceeding on January 7, 1993.

Respectfully submitted,

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APPENDIX

Florida Statutes Annotated § 812.012

812.012. Definitions

As used in ss. 812.012-812.037:

(1) "Dealer in property" means any person in the business of buying and selling property.

(2) "Obtains or uses" means any manner of:

(a) Taking or exercising control over property.

(b) Making any unauthorized use, disposition, or transfer of property.

(c) Obtaining property by fraud, willful misrepresentation of a future act, or false promise.

(d) 1. Conduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, or deception; or

2. Other conduct similar in nature.

(3) "Property" means anything of value, and includes:

(a) Real property, including things growing on, affixed to, and found in land.

(b) Tangible or intangible personal property, including rights, privileges, interests, and claims.

(c) Services.

(4) "Property of another" means property in which a person has an interest upon which another person is not privileged to infringe without consent, whether or not the other person also has an interest in the property.

(5) "Services" means anything of value resulting from a person's physical or mental labor or skill, or from the use, possession, or presence of property, and includes:

(a) Repairs or improvements to property.

(b) Professional services.

(c) Private, public, or government communication, transportation, power, water, or sanitation services.

(d) Lodging accommodations.

(e) Admissions to places of exhibition or entertainment.

(6) "Stolen property" means property that has been the subject of any criminally wrongful taking.

(7) "Traffic" means:

(a) To sell, transfer, distribute, dispense, or otherwise dispose of property.

(b) To buy, receive, possess, obtain control of, or use property with the intent to sell, transfer, distribute, dispense, or otherwise dispose of such property.

(8) "Enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity.

(9) "Value" means value determined according to any of the following:

(a) 1. Value means the market value of the property at the time and place of the offense or, if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the offense.

2. The value of a written instrument that does not have a readily ascertainable market value, in the case of an instrument such as a check, draft, or promissory note, is the amount due or collectible or is, in the case of any other instrument which creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation, the greatest amount of economic loss that the

owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

3. The value of a trade secret that does not have a readily ascertainable market value is any reasonable value representing the damage to the owner, suffered by reason of losing an advantage over those who do not know of or use the trade secret.

(b) If the value of property cannot be ascertained, the trier of fact may find the value to be not less than a certain amount; if no such minimum value can be ascertained, the value is an amount less than $100.

(c) Amounts of value of separate properties involved in thefts committed pursuant to one scheme or course of conduct, whether the thefts are from the same person or from several persons, may be aggregated in determining the grade of the offense.

Florida Statutes Annotated § 812.014

812.014. Theft

(1) A person commits theft if he knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit therefrom.

(b) Appropriate the property to his own use or to the use of any person not entitled thereto.

(2)(a) If the property stolen is valued at $100,000 or more, the offender commits grand theft in the first degree, punishable as a felony of the first degree, as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If the property stolen is valued at $20,000 or more, but less than $100,000, the offender commits grand theft in the second degree, punishable as a felony of the second degree, as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is:

1. Valued at $300 or more, but less than $20,000.

2. A will, codicil, or other testamentary instrument.

3. A firearm.

4. A motor vehicle.

5. Any commercially farmed animal, including any animal of the equine, bovine, or swine class, or other grazing animal, and including aquaculture species raised at a permitted aquaculture facility.

6. Any fire extinguisher.

7. Any amount of citrus fruit consisting of 2,000 or more individual pieces of fruit.

8. Taken from a designated construction site identified by the posting of a sign as provided for in s. 810.09(2)(d).

(d) Theft of any property not specified in paragraph (a), paragraph (b), or paragraph (c) is petit theft and a

misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A person who commits petit theft and who has previously been convicted of any theft commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. A person who commits petit theft and who has previously been convicted two or more times of any theft commits a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.

(d)1. Every judgment of guilty or not guilty of a petit theft shall be in writing, signed by the judge, and recorded by the clerk of the circuit court. The judge shall cause to be affixed to every such written judgment of guilty of petit theft, in open court and in the presence of such judge, the fingerprints of the defendant against whom such judgment is rendered. Such fingerprints shall be affixed beneath the judge's signature to such judgment. Beneath such fingerprints shall be appended a certificate to the following effect:

"I hereby certify that the above and foregoing fingerprints on this judgment are the fingerprints of the defendant, . . . , and that they were placed thereon by said defendant in my presence, in open court, this the . . . day of . . . , 19 . . . " Such certificate shall be signed by the judge, whose signature thereto shall be followed by the word "Judge."

2. Any such written judgment of guilty of a petit theft, or a certified copy thereof, is admissible in evidence in the courts of this state as prima facie evidence that the fingerprints appearing thereon and certified by the judge

are the fingerprints of the defendant against whom such judgment of guilty of a petit theft was rendered.

(3) Failure to comply with the terms of a lease when the lease is for a term of 1 year or longer shall not constitute a violation of this section unless demand for the return of the property leased has been made in writing and the lessee has failed to return the property within 7 days of his receipt of the demand for return of the property. A demand mailed by certified or registered mail, evidenced by return receipt, to the last known address of the lessee shall be deemed sufficient and equivalent to the demand having been received by the lessee, whether such demand shall be returned undelivered or not.

Florida Rules of Criminal Procedure

Rule 3.140. Indictments; Informations

(a) Methods of Prosecution.

(1) *Capital Crimes.* An offense that may be punished by death shall be prosecuted by indictment.

(2) *Other Crimes.* The prosecution of all other criminal offenses shall be as follows:

In circuit courts and county courts, prosecution shall be solely by indictment or information, except that prosecution in county courts for violations of municipal ordinances and metropolitan county ordinances may be by affidavit or docket entries and prosecutions for misdemeanors, municipal ordinances, and county ordinances may be by notice to appear issued and served pursuant to rule 3.125. A grand jury may indict for any offense. When a grand jury returns an indictment for an offense not triable in the circuit court, the circuit judge shall either issue a summons returnable in the county court or shall bail the accused for trial in the county court, and the judge, or at the judge's direction, the clerk of the circuit court, shall certify the indictment and file it in the records of the county court.

(b) Nature of Indictment or Information. The indictment or information on which the defendant is to be tried shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.

(c) Caption, Commencement, Date, and Personal Statistics.

(1) *Caption.* No formal caption is essential to the validity of an indictment or information on which the defendant is to be tried. Upon objection made as to its absence a caption shall be prefixed in substantially the following manner:

In the (name of court)

State of Florida versus (name of defendant)

Any defect, error, or omission in a caption may be amended as of course, at any stage of the proceeding, whether before or after a plea to the merits, by court order.

(2) *Commencement.* All indictments or informations on which the defendant is to be tried shall expressly state that the prosecution is brought in the name and by the authority of the State of Florida. Indictments shall state that the defendant is charged by the grand jury of the county. Information shall state that the appropriate prosecuting attorney makes the charge.

(3) *Date.* Every indictment or information on which the defendant is to be tried shall bear the date (day, month, year) that it is filed in each court in which it is so filed.

(4) *Personal Statistics.* Every indictment or information shall include the defendant's race, gender, date of birth, and social security number when any of these facts are known. Failure to include these facts shall not invalidate an otherwise sufficient indictment or information.

(d) The Charge.

(1) *Allegation of Facts; Citation of Law Violated.* Each count of an indictment or information on which the defendant is to be tried shall allege the essential facts constituting the offense charged. In addition, each count shall recite the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. Error in or omission of the citation shall not be ground for dismissing the count or for a reversal of a conviction based thereon if the error or omission did not mislead the defendant to the defendant's prejudice.

(2) *Name of Accused.* The name of the accused person shall be stated, if known, and if not known, the person may be described by any name or description by which the person can be identified with reasonable certainty. If the grand jury, prosecuting attorney, or affiant making the charge does not know either the name of the accused or any name or description by which the accused can be identified with reasonable certainty, the indictment or information, as the case may be, shall so allege and the accused may be charged by a fictitious name.

(3) *Time and Place.* Each count of an indictment or information on which the defendant is to be tried shall contain allegations stating as definitely as possible the time and place of the commission of the offense charged in the act or transaction or on 2 or more acts or transactions connected together, provided the court in which the indictment or information is filed has jurisdiction to try all of the offenses charged.

(4) *Allegation of Intent to Defraud.* If an intent to defraud is required as an element of the offense to be charged, it shall be sufficient to allege an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded.

(e) Incorporation by Reference. Allegations made in 1 count shall not be incorporated by reference in another count.

(f) Endorsement and Signature; Indictment. An indictment shall be signed by the foreperson or the acting foreperson of the grand jury returning it. The state attorney or acting state attorney or an assistant state attorney shall make and sign a statement on the indictment to the effect that he or she has advised the grand jury returning the indictment as authorized and required by law. No objection to the indictment, on the ground that the statement has not been made shall be entertained after the defendant pleads to the merits.

(g) Signature, Oath, and Certification; Information. An information charging the commission of a felony shall be signed by the state attorney, or a designated assistant state attorney, under oath stating his or her good faith in instituting the prosecution and certifying that he or she has received testimony under oath from the material witness or witnesses for the offense. An information charging the commission of a misdemeanor shall be signed by the state attorney, or a designated assistant state attorney, under oath stating his or her good faith in instituting the prosecution. No objection to an information on the ground that it was not signed or verified, as

herein provided, shall be entertained after the defendant pleads to the merits.

(h) Conclusion. An indictment or information on which the defendant is to be tried need contain no formal conclusion.

(i) Surplusage. An unnecessary allegation may be disregarded as surplusage and, on motion of the defendant, may be stricken from the pleading by the court.

(j) Amendment of Information. An information on which the defendant is to be tried that charges an offense may be amended on the motion of the prosecuting attorney or defendant at any time prior to trial because of formal defects.

(k) Form of Certain Allegations. Allegations concerning the following items may be alleged as indicated below:

(1) *Description of Written Instruments.* Instruments consisting wholly or in part of writing or figures, pictures, or designs may be described by any term by which they are usually known or may be identified, without setting forth a copy or facsimile thereof.

(2) *Words; Pictures.* Necessary averments relative to spoken or written words or pictures may be made by the general purport of such words or pictures without setting forth a copy or facsimile thereof.

(3) *Judgments; Determinations; Proceedings.* A judgment, determination, or proceeding of any court or official, civil or military, may be alleged generally in such a manner as to identify the judgment, determination, or proceeding,

without alleging facts conferring jurisdiction on the court or official.

(4) *Exceptions; Excuses; Provisos.* Statutory exceptions, excuses, or provisos relative to offenses created or defined by statute need not be negatived [sic] by allegation.

(5) *Alternative or Disjunctive Allegations.* For an offense that may be committed by doing 1 or more of several acts, or by 1 or more of several means, or with 1 or more of several intents or results, it is permissible to allege in the disjunctive or alternative such acts, means, intents, or results.

(6) *Offenses Divided into Degrees.* For an offense divided into degrees it is sufficient to charge the commission of the offense without specifying the degree.

(7) *Felonies.* It shall not be necessary to allege that the offense charged is a felony or was done feloniously.

(l) Custody of Indictment or Information. Unless the defendant named therein has been previously released on a citation, order to appear, personal recognizance, or bail, or has been summoned to appear, or unless otherwise ordered by the court having jurisdiction, all indictments or informations and the records thereof shall be in the custody of the clerk of the court to which they are presented and shall not be inspected by any person other than the judge, clerk, attorney general, and prosecuting attorney until the defendant is in custody or until 1 year has elapsed between the return of an indictment or the filing of an information, after which time they shall be opened for public inspection.

(m) Defendant's Right to Copy of Indictment or Information. Each person who has been indicted or informed against for an offense shall, on application to the clerk, be furnished a copy of the indictment or information and the endorsements thereon, at least 24 hours before being required to plead to the indictment or information if a copy has not been so furnished. A failure to furnish a copy shall not effect the validity of any subsequent proceeding against the defendant if he or she pleads to the indictment or information.

(n) Statement of Particulars. The court, on motion, shall order the prosecuting attorney to furnish a statement of particulars when the indictment or information on which the defendant is to be tried fails to inform the defendant of the particulars of the offense sufficiently to enable the defendant to prepare a defense. The statement of particulars shall specify as definitely as possible the place, date, and all other material facts of the crime charged that are specifically requested and are known to the prosecuting attorney, including the names of persons intended to be defrauded. Reasonable doubts concerning the construction of this rule shall be resolved in favor of the defendant.

(o) Defects and Variances. No indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses or for any cause whatsoever, unless the court shall be of the opinion that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense or expose the accused after

conviction or acquittal to substantial danger of a new prosecution for the same offense.

Committee Notes to Florida Rules of Criminal Procedure, Rule 3.140(n):

(n) Statement of Particulars. The phrase, "bill of particulars," has been modernized by changing "bill" to "statement." Historically, a "bill" is a written statement. The first sentence of this proposal is taken from section 906.27, Florida Statutes, the only change being the narrowing of the scope of judicial discretion now granted by the statute. The latter part of the proposal is recommended in order to clarify the requirements of the rule. Provision for the accusatorial affidavit has been added.

New York Penal Law § 155.05 Larceny; defined

1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:

(a) By conduct heretofore defined or known as common law larceny by tespassory taking, common law larceny by trick embezzlement, or obtaining property by false pretenses;

(b) By acquiring lost property.

A person acquires lost property when he exercises control over property of another which

he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or the nature or amount of the property, without taking reasonable measures to return such property to the owner;

(c) By committing the crime of issuing a bad check, as defined in section 190.05;

(d) By false promise.

A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in particular conduct, and when he does not intend to engage in such conduct or, as to the case may be, does not believe that the third person intends to engage in such conduct.

In any prosecution for larceny based upon a false promise, the defendant's intention or belief that the promise would not be performed may not be established by or inferred from the fact alone that such promise was not performed. Such a finding may be based only upon evidence establishing that the facts and circumstances of the case are wholly consistent with guilty intent or belief and wholly inconsistent with innocent intent or belief, and excluding to a moral certainty every hypothesis except that of the defendant's intention or belief that the promise would not be performed;

(e) By extortion.

A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person to deliver such property to himself or to

a third person by means of instilling in him a fear that, if the property is not so delivered the actor or another will:

(i) Cause physical injury to some person in the future; or

(ii) Cause damage to property; or

(iii) Engage in other conduct constituting a crime; or

(iv) Accuse some person of a crime or cause criminal charges to be instituted against him; or

(v) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

(vi) Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act; or

(vii) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(viii) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or

(ix) Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person

materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationship.

New York Criminal Procedure Law § 200.50 and Practice Commentaries

§ 200.50 Indictment; form and content

An indictment must contain:

1. The name of the superior court in which it is filed; and

2. The title of the action and, where the defendant is a juvenile offender, a statement in the title that the defendant is charged as a juvenile offender; and

3. A separate accusation or count addressed to each offense charged, if there be more than one; and

4. A statement in each count that the grand jury, or, where the accusatory instrument is a superior court information, the district attorney, accuses the defendant or defendants of a designated offense; and

5. A statement in each count that the offense charged therein was committed in a designated county; and

6. A statement in each count that the offense charged therein was committed on, or on or about, a designated date, or during a designated period of time; and

7. A plain and concise factual statement in each count which, without allegations of an evidentiary nature,

(a) asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision to clearly

apprise the defendant or defendants of the conduct which is the subject of the accusation; and

(b) in the case of any armed felony, as defined in subdivision forty-one of section 1.20, states that such offense is an armed felony and specifies the particular implement the defendant or defendants possessed, were armed with, used or displayed or, in the case of an implement displayed, specifies what the implement appeared to be; and

8. The signature of the foreman or acting foreman of the grand jury, except where the indictment has been ordered reduced pursuant to subdivision one-a of section 210.20 of this chapter or the accusatory instrument is a superior court information; and

9. The signature of the district attorney.

Practice Commentaries

by Peter Preiser

This section prescribes the formal requisites for an indictment. Subdivisions one, two, three, five, eight and nine deal with mechanics and do not appear to call for explication. The Practice Commentaries for certain other CPL sections may, however, be of assistance to those in search of the rationale for some of these formal components. Thus, the rationale for the juvenile offender designation required by subdivision two is explained in the Practice Commentaries on CPL § 180.75. For subdivision three, see the Commentaries on CPL § 200.30. The Commentaries for CPL § 20.40 should be of use in connection

with subdivision five. And for subdivisions eight and nine, see the Commentaries for CPL § 200.10.

Subdivisions four, six and seven are designed to fulfill the following purposes: inform the defendant of the crime charged so as to enable preparation for defense at trial; enable determination of whether the facts alleged by the grand jury are legally sufficient to constitute the offense charged; assure that the offense to be tried is the same in name and in theory as the one voted by the grand jury – as opposed to some variation substituted by the prosecutor; and serve as a record to be used on a motion to bar a subsequent prosecution in violation of the double jeopardy provisions of CPL Article 40.

In considering these purposes it is important to observe that an indictment may be technically adequate to fulfill the requirements of this section, but nevertheless lack sufficient substance to be of any practical value to the defendant in regard to one or more of the factors. The reason for this seeming paradox is that under modern criminal procedure the defendant may demand and receive substantial additional pre-trial information through a bill of particulars (CPL § 200.95) and through discovery (CPL Article 240). The defendant also has a virtually absolute right to require the trial court to inspect the minutes of the grand jury proceeding to determine legal sufficiency of the evidence before the grand jury (see CPL § 210.30[2], [3]). Note too, that the availability of these supplementary aids has led the courts to conclude that an insufficiency in the factual allegations is not a jurisdictional defect: it is cause for dismissal on a motion timely made; but is deemed waived where the motion is not made or a plea of a guilty is entered. See

People v. Iannone, 1978, 45 N.Y.2d 589, 412 N.Y.S.2d 110, 384 N.E.2d 656; *People v. Cohen*, 1981, 52 N.Y.2d 584, 439 N.Y.S.2d 321, 421 N.E.2d 813; see also *People v. Alejandro*, 1987, 70 N.Y.2d 133, 138-139, 517 N.Y.S.2d 927, 511 N.E.2d 71.

The specifics of the indictment as supplemented by the bill of particulars assume a critical role at trial. Here the indictment serves as a guideline to prevent the case from being prosecuted and submitted to the petit jury for ultimate determination on a theory other than the one charged by the grand jury. Where that occurs, the error is known as "variance" and, should timely objection be overruled, it requires reversal of the conviction. See *e.g.*, *People v. Grega*, 1988, 72 N.Y.2d 489, 534 N.Y.S.2d 647, 531 N.E.2d 279, on remand 146 A.D.2d 871, 536 N.Y.S.2d 581. Variance should be distinguished, however, from a situation where the indictment alleges more than is necessary to support the offense charged. In such case – assuming absence of duplicity (see CPL § 200.30) – the prosecution need only prove facts necessary for conviction, and the balance of the factual allegations may be disregarded as surplusage. See *People v. Charles*, 1984, 61 N.Y.2d 321, 473 N.Y.S.2d 941, 462 N.E.2d 118.